

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

GLORIA BURKHAM ANAYA, as
personal representative of the estate of
THOMAS WAYNE BURKHAM,

Plaintiff,

v.

OFFICER RUBEN MONTEZ, individually
and in his official capacity; and VILLAGE
OF LOVING, NEW MEXICO,

Defendants.

Civ. No. 98-380 BRB/WWD

MEMORANDUM OPINION AND ORDER

This matter is before the court on Defendants' motion to dismiss the complaint. See Fed. R. Civ. P. 12(b)(6). Plaintiff has filed a memorandum opposing the motion. Plaintiff brings this action pursuant to 42 U.S.C. § 1983, alleging that Defendants Ruben Montez, individually and in his official capacity, and the Village of Loving violated the Fourth and Fourteenth Amendments of the United States Constitution when Montez shot and killed Thomas Wayne Burkham. Plaintiff also invokes the court's supplemental jurisdiction under 28 U.S.C. § 1367 to bring state law claims for assault and battery, and wrongful death. Plaintiff seeks compensatory and punitive damages from Defendants.

I. Background

Plaintiff, the mother of Burkham and personal representative of his estate, alleges that Montez, an officer of the Loving Police Department, killed her son on March 28,

1997. The complaint sets forth the following facts. Montez was dispatched to Burkham's home to check on his welfare. While in the home, Montez fired several shots at Burkham, killing him. Plaintiff alleges that Montez violated Burkham's Fourth and Fourteenth Amendment rights by using "unnecessary, unreasonable and excessive force" which was "unjustified, unprivileged and unconsented [sic] to." Plaintiff also alleges that the Village of Loving is liable for Montez's acts because the city negligently hired him and failed to adequately "train, supervise and control" him.

In their motion to dismiss, Defendants assert that (1) the complaint fails to state a Fourteenth Amendment substantive due process claim; (2) Montez is entitled to qualified immunity; (3) the complaint fails to state a Fourth Amendment municipal liability claim against the Village of Loving; (4) the complaint fails to state a claim under the New Mexico Tort Claims Act ("NMTCA") because timely notice was not provided to Defendants as required under N.M. Stat. Ann. § 41-4-16; and (5) Plaintiff may not recover punitive damages under § 1983 or the NMTCA.

In ruling on a 12(b)(6) motion to dismiss, the court must construe the complaint in a light most favorable to the plaintiff and accept the allegations asserted in the complaint as true. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The court may not grant a motion to dismiss for failure to state a claim upon which relief may be granted unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-56 (1957). The court may not weigh potential evidence that the parties might present at trial. Instead the court must

assess whether Plaintiff's complaint is legally sufficient to state a claim upon which relief may be granted. Miller v. Glanz, 948 F.2d 1562, 1565 (10th Cir. 1991).

A heightened pleading standard applies, however, to Montez's qualified immunity defense. Breidenbach v. Bolish, 126 F.3d 1288, 1293 (10th Cir. 1997). Where qualified immunity is raised in a 12(b)(6) motion, the complaint must contain "specific, non-conclusory allegations of fact sufficient to allow the district court to determine that those facts, if proved, demonstrate that the actions taken were not objectively reasonable in light of clearly established law." Id. In contrast, this heightened standard does not apply to the claim against the Village of Loving. Leatherman v. Tarrant County, 507 U.S. 163, 164 (1993) (heightened pleading standard may not be applied to § 1983 claims alleging municipal liability).

II. Fourteenth Amendment

Defendants argue that Plaintiff failed to state a Fourteenth Amendment substantive due process claim against Montez and the Village of Loving.¹ Plaintiff alleges that the use of excessive force by Montez violated the Fourteenth Amendment. A claim that a law enforcement officer used excessive force in the arrest or other seizure of a citizen "should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than

¹The complaint does not explicitly refer to substantive due process, but merely states that Defendants violated the Fourteenth Amendment. The complaint, however, contains no factual allegations which raise either a Fourteenth Amendment procedural due process or equal protection claim. Therefore, the court will presume that Plaintiff intended to allege a substantive due process claim. The court also notes, however, that Plaintiff may have merely included the Fourteenth Amendment to remind the court of the applicability of the Fourth Amendment to state action. See Soldal v. Cook County, Ill., 506 U.S. 56, 61 (1992).

under a ‘substantive due process’ approach.” Graham v. Connor, 490 U.S. 386, 395 (1989). Where as here, “a particular amendment provides an explicit textual source of constitutional protection” the claim arises not under substantive due process, but under the distinct amendment. Id.; see also County of Sacramento v. Lewis, 118 S.Ct. 1708, 1714 (1998). Consequently, the court will grant Defendants’ motion to dismiss in regard to Plaintiff’s Fourteenth Amendment substantive due process claim, and will analyze Plaintiff’s § 1983 excessive force claim solely under the Fourth Amendment.

III. Qualified Immunity

Defendants argue that Montez, in his individual capacity, is entitled to qualified immunity. Qualified immunity spares a defendant the burden of proceeding with the litigation unless the plaintiff can show that a defendant violated “clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Once Defendants raised the qualified immunity defense, the burden shifted to Plaintiff to show that Defendants violated clearly established law. Breidenbach, 126 F.3d at 1291. To withstand a qualified immunity defense, Plaintiff must “identify a clearly established . . . constitutional right of which a reasonable person would have known, and then allege facts to show that the defendant’s conduct violated that right.” Id. At the motion to dismiss stage, the qualified immunity analysis is limited to Defendants’ conduct as alleged in the complaint. See Behrens v. Pelletier, 516 U.S. 299, 309 (1996). If the complaint does not contain allegations of requisite specificity, Plaintiff “must amend his or her complaint to include specific, non-

conclusory allegations of fact.” Breidenbach, 126 F.3d at 1292. In this case, Plaintiff did not amend the complaint after Defendants raised the qualified immunity defense.

A.

First, the court must determine whether the law regarding a police officer’s use of deadly force was clearly established at the time of the alleged constitutional violation. See Breidenbach, 126 F.3d at 1291. In order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clear weight of authority from other courts “must have found the law to be as the plaintiff maintains.” Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992).

The Fourth Amendment guarantees citizens the right “to be secure in their persons . . . against unreasonable . . . seizures.” U.S. Const. amend. IV. Thus, a Fourth Amendment excessive force claim requires a showing that an “unreasonable seizure” occurred. Brower v. Inyo County, 489 U.S. 593, 599 (1989). If a police officer “restrains the freedom of a person to walk away, he has seized that person.” Tennessee v. Garner, 471 U.S. 1, 7 (1985). Without question, if deadly force is used an individual is “seized” for purposes of the Fourth Amendment. See id. Furthermore, an officer may justifiably use deadly force only if the officer had probable cause to believe that there was a threat of serious physical harm to himself or others. Garner, 471 U.S. at 11; Sevier v. City of Lawrence, Kan., 60 F.3d 695, 699 (10th Cir. 1995). The reasonableness of the use of deadly force depends on whether the officer was “in danger at the precise moment that [he] used force and on whether Defendant’s own reckless or deliberate conduct during the seizure unreasonably

created the need to use such force.” See Thompson v. City of Lawrence, Kan., 58 F.3d 1511, 1516 (10th Cir. 1995). This standard is an objective one, without regard to the officer’s intent or motivation. Graham, 490 U.S. at 397. In light of the foregoing case law, the court concludes that in 1997 the law was clearly established that an officer’s use of deadly force, without probable cause to reasonably believe that the officer or others were in danger, violates the Fourth Amendment.

B.

Next, the court must determine whether Plaintiff has alleged “facts sufficient to demonstrate that Defendant’s conduct was ‘objectively unreasonable’ in light of clearly established law.” Breidenbach, 126 F.3d at 1292. Although the court construes the facts and reasonable inferences drawn from them in favor of Plaintiff, Plaintiff must do more than “identify in the abstract a clearly established right and allege that the defendant violated it.” Romero v. Fay, 45 F.3d 1472, 1475 (10th Cir. 1995). Plaintiff must “articulate a clearly established constitutional right and the . . . conduct which violated that right with specificity.” Id. The complaint must include “all the factual allegations necessary to sustain a conclusion that defendant violated clearly established law.” Sawyer v. County of Creek, 908 F.2d 663, 667 (10th Cir. 1990). Plaintiff’s complaint falters under this heightened pleading standard, which, as the Tenth Circuit explained in Breidenbach, “requires that a plaintiff do more than assert bare allegations of a constitutional violation.” Breidenbach, 126 F.3d at 1293.

In the present case, Plaintiff’s complaint fails to allege any specific facts to support

the claim that Officer Montez acted unreasonably when he shot the decedent. Plaintiff alleges the following: “On or about March 28, 1997, Loving Police Officer Ruben Montez was dispatched to the home of the decedent to check on his welfare. In the course of his contact with the Plaintiff’s decedent, Defendant Montez failed to exercise reasonable control of the situation and ultimately fired several shots at the decedent killing him. Defendant Montez failed to use generally accepted proper police procedures and techniques in dealing with the decedent.” The complaint also alleges that the shooting was “without justification” and “unprivileged.” The complaint contains no other allegations regarding Officer Montez’s conduct. There are no factual allegations to support Plaintiff’s bare assertion that the shooting was unjustified. Plaintiff failed to allege any facts in support of an inference that the decedent was not a threat to Officer Montez or others. Plaintiff does not allege what occurred in the decedent’s home prior to or at the time of the shooting, or even that the decedent was unarmed. The complaint simply does not contain specific allegations which, if proved, would allow the court to conclude that Officer Montez violated the Fourth Amendment. Under the standard set forth in Breidenbach, the court cannot “subject a government official to discovery based on a complaint which is supported only by conclusory allegations and speculation of a constitutional violation.” Breidenbach, 126 F.3d at 1293. Thus, Officer Montez is entitled to qualified immunity and the Fourth Amendment claim against him will be dismissed.

IV. § 1983 Municipal Liability

Plaintiff also brings a § 1983 Fourth Amendment claim against both the Village of Loving and Officer Montez in his official capacity.² A suit against a municipal employee acting in his official capacity is the equivalent of a suit against the municipality itself. Brandon v. Holt, 469 U.S. 464, 472 n.21; Watson v. City of Kansas City, Kan., 857 F.2d 690, 695 (10th Cir. 1988). Therefore, the court will concurrently address Plaintiff's claim against the Village of Loving and the claim against Montez in his official capacity.

To state a claim against the Village of Loving, Plaintiff cannot rely upon the theory of respondeat superior. Monell v. Dep't of Social Services, 436 U.S. 658, 691 (1978). Plaintiff must show that a policy or custom of the Village caused the alleged constitutional violation. McMillian v. Monroe County, Ala., 117 S.Ct. 1734, 1736 (1997). In the present case, Plaintiff alleges that the Village of Loving is liable under § 1983 because it failed to adequately train and supervise Officer Montez.

The inadequacy of police training may result in § 1983 liability only if the inadequacy constitutes "deliberate indifference to the rights of persons with whom the police come into contact." City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989). Thus, a municipality's failure to train must reflect a "deliberate" or "conscious" choice. Only then does the municipality's action become a "policy" giving rise to § 1983 liability. See id. at 389.

In this case, the court must first determine the effect of Montez's qualified

² Plaintiff also brings suit against Montez in his individual capacity. See supra Part III.

immunity on the Village of Loving's liability. The defense of qualified immunity does not always shelter a municipality from liability. Medina, 960 F.2d at 1499-1500. When a finding of qualified immunity is predicated on the basis that the law is not clearly established, "there is nothing anomalous about allowing such a suit [against the municipality] to proceed when immunity shields the individual defendants." Watson v. City of Kansas City, Kan., 857 F.2d 690, 697 (10th Cir. 1988). In contrast, where qualified immunity is based upon a finding that the officer's conduct did not amount to a constitutional violation, a municipality is relieved of liability. See Hinton v. City of Elwood, Kan., 997 F.2d 774, 783 (10th Cir. 1993).

This court has already concluded that Officer Montez is entitled to qualified immunity because Plaintiff failed to allege facts sufficient to establish a constitutional violation. Because the court predicated qualified immunity upon the lack of a constitutional violation and not on a finding that the law was not clearly established, municipal liability is precluded. See Hinton, 997 F.2d at 783. Accordingly, the court will dismiss the § 1983 Fourth Amendment claim against the Village of Loving.

V. State law claims

Plaintiff also raises several state law claims against Defendants. According to 28 U.S.C. § 1367(c)(3), a court may decline to exercise supplemental jurisdiction if the court has dismissed all claim over which it has original jurisdiction. See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1237 (10th Cir. 1997). Because the court will dismiss all of

Plaintiff's federal claims against Defendants, the court, in its discretion, will also decline to exercise supplemental jurisdiction over Plaintiff's state law claims and will dismiss those claims without prejudice.

Accordingly,

IT IS HEREBY ORDERED that Defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss the complaint is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Fourth and Fourteenth Amendment claims against OFFICER RUBEN MONTEZ, individually and in his official capacity, and the VILLAGE OF LOVING, NEW MEXICO, are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Plaintiff's state law claims against OFFICER RUBEN MONTEZ and the VILLAGE OF LOVING, NEW MEXICO, are DISMISSED WITHOUT PREJUDICE.

Judgment will be entered accordingly.

So ordered this 20th day of August, 1998.

Bobby R. Baldock
UNITED STATES CIRCUIT JUDGE
Sitting by Designation

Attorneys of Record:

James W. Klipstine, Jr., Hobbs, New Mexico, for Plaintiff.

Tila F. Hoffman, Tila Fleming Hoffman, P.C., Albuquerque, New Mexico, for Defendants.